In the Supreme Court of the United States

October Term, 1978
No. 78-102

JOHN BARNA, ANDREW EWONISHON, FRANK E. RUPP, JR. and FRANK T. MANCUSO,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this case on June 23, 1978.

OPINION BELOW

The Judgment Order of the Court of Appeals below (Appendix, infra, p. 23) is reported as United States v. John Barna, et al., —— F.2d —— (C.A. 3, 1978). Court of Appeals below did not write an opinion.

The opinion of the District Court filed January 10, 1978 is not reported as yet but is printed infra, p. 25.

JURISDICTION

The judgment of the Court of Appeals below (Appendix, infra, p. 23) was entered on June 23, 1978. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Is the indictment sufficient to constitute an offense against the United States?

2. Are the verdicts of guilty supported by the law and the evidence?

3. Was there a fatal variance between the charges set forth in the indictment and the proof offered by the Government at trial?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The principal provisions of the Constitution involved are the Commerce Clause, Article I, Section 8, Cl. 3, and the Fifth and Sixth Amendments.

2. The statute under which petitioners were prosecuted was the Hobbs Act, 18 U.S.C. 1951, which provides, in pertinent part, as follows:

> "Section 1951. Interference with commerce by threats or violence.
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (b) (3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

STATEMENT OF THE CASE

Petitioners were indicted by a Grand Jury sitting in the Middle District of Pennsylvania on September 27, 1976. All of the defendants named in the indictment were charged with violation of the Hobbs Act, 18 U.S.C. 1951. All defendants were charged in Count No. 1 with conspiracy; defendant, Moore, was charged with substantive violations of the Act in Counts II and III (which were dismissed by the Court at trial); defendant, Barna, was charged with substantive violations of the Act in Counts IV, V and VI (Count VI was dismissed by the Court at trial). The case of the defendant, Monahan, was severed by the Court prior to trial.

All of the charges grew out of alleged wrongdoing by the named defendants while they were allegedly members of the Carbondale Area School District in Lackawanna County, Pennsylvania.

All of the named defendants entered pleas of not guilty and a jury trial was held in Scranton, Pennsylvania, on May 2 through 5, 1977. The jury returned a verdict of guilty against all defendants on Count I, and against the defendant, Barna, on Counts IV and V.

Petitioners filed timely motions for new trial and, in the alternative, for arrest of judgment. These motions were denied by the District Court on January 10, 1978. Judgments of sentences were entered against petitioners on February 3, 1978. Petitioners filed timely notices of appeal on February 9 and 10, 1978.

Petitioners filed a motion in the U. S. Court of Appeals below to consolidate their appeals for briefing, argument and disposition on the merits, which motion was granted on March 6, 1978.

Appeal was denied by the U. S. Court of Appeals below, and judgment of the District Court affirmed on June 23, 1978. (Appendix, infra, p. 23).

REASONS FOR GRANTING THE WRIT

I. THE INDICTMENT IS INSUFFICIENT TO CONSTITUTE AN OFFENSE AGAINST THE UNITED STATES

1. The Indictment Fails To Charge Requisite Jurisdictional Interstate Commerce Facts

The Government has charged the petitioners in this case with violations of the Hobbs Act, 18 U.S.C. 1951.

Petitioners submit that the indictment as drawn and the evidence offered by the Government to prove the charges alleged do not state a crime within the purview of the Hobbs Act.

The statute provides in part as follows:

"Section 1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(b) (3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

In order to meet the jurisdictional requirements of the Act there must be an obstruction, delay or effect upon commerce as defined in the statute, and it must be done by (a) robbery, or (b) extortion, in furtherance of a plan or purpose to violate the subject statute.

It is unquestioned, of course, in this case that there has been no robbery so, if there is a crime at all, it must be grounded on extortion, as defined in the Act, in furtherance of a plan or purpose to violate the subject statute.

Interstate Commerce

If the Commerce Clause, United States Constitution, Article I, Section 8, Cl. 3, has any limitation at all, then it is submitted that this Court must hold that the facts as alleged in the indictment in this case, and under the proof offered by the Government, do not bring these charges within the purview of the Commerce Clause. To hold

otherwise clearly negates the entire meaning and purpose of the Commerce Clause. If the acts alleged by the Government in this indictment are within the Commerce Clause, then it is submitted that the effect thereof is completely wiped out and there is no residual authority vested in the State Governments. For if the acts stated in this case are within the powers delegated to Congress, the limitation imposed upon the Federal Government by the Commerce Clause is meaningless and the power of the Federal Government is supreme and without any limitation whatever. This is entirely contra to our federal system as promulgated by the founding fathers.

The interstate commerce requirement of the Act is, of course, jurisdictional and without it there can be no prosecution. *Stirone v. United States,* 361 U.S. 212 (1960).

The sole power given to Congress under the Constitution, Article I, Section 8, Clause 3 is to regulate commerce between the states and foreign countries. *Gibbons v. Ogden,* 9 Wheat. 1; *Brown v. Maryland,* 12 Wheat. 419.

The subject of federal power is still *commerce,* and not all commerce, but only commerce with foreign nations and among the several states. The expansion of enterprise has vastly increased the interests of interstate commerce but constitutional differentiation still exists.

The authority of the Federal Government to regulate interstate commerce may not be pushed to such an extreme as to destroy the distinction which the Commerce Clause itself establishes between commerce among the several states and the internal commerce within a state.

Activities local in their immediacy do not become interstate and national because of distant repercussions. *Veazey Drug Co. v. Fleming,* 42 F.S. 689 (1941); *Schecter Poulty Corp. v. U.S.,* 295 U.S. 495.

In *Bagby v. Cleveland Wrecking,* 28 F.S. 271 (1939) the following pertinent language appears:

> ". . . It seems to be well settled that in order for a local activity to come within the interstate commerce clause of the Constitution . . . it must have more than an indirect and remote effect upon interstate commerce. N.L.R.B. v. Loughlin, 301 U.S. 1.
>
> In 301 U.S. 1, the court said: '. . . Undoubtedly the scope of this power (the commerce clause) must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government . . .' "

Not every case of extraction of money allegedly under the Hobbs Act proscription meets the test of the interstate commerce requirements. *United States v. Critchley,* 353 F.2d 358 (C.A. 3, 1965).

In several cases under the Fair Labor Standards Act, which is also grounded on the authority of the Commerce Clause of the Constitution, and where the intent of Congress was to exercise its constitutional authority to the fullest extent (as in the Hobbs Act), the courts have held that the activities of a firm of consulting engineers and architects in preparing plans and specifications for con-

struction work on state highways did not constitute commerce under the Act. See *McComb. v. Turpin,* 81 F.S. 86 (1948); *Kelly v. Ford, et al.,* 162 F.2d 555 (C.A. 3, 1947); *Collins v. Ford, Bacon and Davis, Inc.,* 66 F.S. 424 (1946).

The language of the indictment contained no indications of any kind that Riggi and Riggi is an architectural firm dealing in interstate commerce, and there is no language of any kind in the indictment to indicate what articles or commodities moving in interstate commerce were affected, or the quality or quantity thereof; neither is there any language to indicate how there was any effect on commerce.

The Supreme Court, in *Stirone v. United States,* 361 U.S. 212 (1960) held that (1) interference with commerce and (2) extortion (or robbery) are essential elements of the Hobbs Act offense and both must be charged in the indictment. The Court said, at page 218, "neither is surplusage and neither can be treated as surplusage".

The general rule with regard to the specificity of the indictment was established in *United States v. Callanan,* 113 F. Supp. 766 (E.D. Mo., 1953). In *Callanan,* the indictment was couched in the general terms of the statute, i.e., it alleged "wrongful use of actual and threatened force, violence and fear", without pleading specific facts. The Court held that the indictment fell "short of stating the substance of the offense and informing the defendants of the essential facts of the charge they must meet".

Under the *Callanan* test, an indictment is defective if it fails:

(1) to state the facts on which the Government will rely to show wrongful, actual or threatened force, violence and fear, or extortion, as charged;

(2) to plead the facts connecting the condemned conduct with interstate commerce.

The charging sections of the various counts of the indictment in the case presently before the Court are identical with the language of the charging section of the indictment in *Callanan,* which was held defective by the Court.

Both the indictment in this case and the indictment in *Callanan* followed the language of the statute. The Court held the *Callanan* indictment was not sufficient under the circumstances. The Court stated:

> ". . . The indictment follows the language of the Act, as just noted, 'wrongful use of actual force, violence or fear'. Facts sustaining this part of the charge against the defendant could be proven and it would not necessarily follow that the defendant had violated the law. The Government must go further, and prove that by such conduct '. . . interstate commerce has been "affected", or that there was an "attempt" to do so.' Absence of reference to interstate commerce in the definition of extortion (as defined in 18 U.S.C. 1951 (b) (2)) renders that portion of the law incomplete, and, consequently, an indictment following the language of the statute is incomplete to state a charge under the law. This defect cannot be cured by a bill of particulars. It is substantive."

In *United States v. Critchley,* 353 F.2d 358 (C.A. 3, 1965), the Court stated, ". . . It is well settled law that the defendant cannot be subjected to prosecution for interference with interstate commerce which the grand jury did not charge. The Supreme Court (citing U.S. v. Stirone, cited supra,) has indicated that indictments charging violations of the Hobbs Act must be strictly construed."

In *Stirone,* cited supra, the indictment charged interference with the shipment of sand into Pennsylvania to be used in the building of a steel plant there. The proof showed not only an interference with the shipment of sand but also an interference with prospective shipments of steel to be produced at the plant. The Court reversed the conviction and held that there was a fatal variance between the charges and the proof.

A fortiori, if the indictment charges no specific acts involving interstate commerce at all, there can be no proof of same at trial and the indictment must be dismissed. This is the teaching of *Callanan, Critchley* and *Stirone,* cited supra.

In the indictment presently before the Court, there is nothing to indicate that the "victim" firm is (a) actually involved in interstate commerce; (b) is dependent upon interstate commerce for supplies, or (c) is directly or indirectly involved in planning facilities in interstate commerce. *U.S. v. Anderson,* 368 F. Supp. 1253 (Md. 1973).

Extensive research by counsel of reported cases of Hobbs Act violations has failed to disclose any case, except *United States v. Callanan,* cited supra, where the indictment was held defective, in which there was not an affirmative statement of specific interstate facts. It is apparent from the language of the indictment presently before the Court that the Grand Jury gave no consideration to interstate aspects, an essential element of the crime, and had no evidence of it or of any specific interstate facts.

In considering this motion, the inquiry of the Court is limited to "whether on its face the indictment presents evidence which assures us that such essential elements were presented to the grand jury and deliberated upon by them in returning the indictment." *U.S. v. DeCavalcante,* 440 F.2d 1264 (C.A. 3, 1971).

It is now clear, after trial, from the Grand Jury testimony of Riggi, the alleged victim (Appendix, infra, p. 42), which was made available pursuant to the Jencks Act (18 U.S.C. 3500) and the testimony of Riggi, who was a Government witness, that there was absolutely no evidence of any kind presented to the Grand Jury (1) that Riggi was engaged in interstate commerce, or (2) that his business had even the slightest effect on interstate commerce (Trial Trespass pp. 154-156).

Petitioners submit that there was absolutely no evidence presented to the Grand Jury of one of the essential elements of the crime as charged. How could the Grand Jury conclude that there was sufficient evidence before it to return this indictment when there was absolutely no evidence at all of effect on interstate commerce, which is the very element which confers federal jurisdiction under the statute and the Constitution of the United States? *Stirone v. U.S.,* cited supra.

Petitioners submit that it is crystal clear that the government prosecutor merely prepared the indictment (which, for reasons above stated, is defective as drawn) and handed it to the Grand Jury. It is submitted that the presentation of this case to the Grand Jury without any evidence at all of the jurisdiction requirement of effect on interstate commerce, makes a mockery of the Grand Jury process, and the indictment is fatally defective.

Petitioners further submit that the total lack of any jurisdictional evidence of interstate commerce before the Grand Jury explains why the indictment was so vaguely and generally drawn and did not delineate the interstate activity required under the teaching of *U.S. v. Callanan,* cited supra, and *U.S. v. Critchley,* cited supra.

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2. The Indictment Is Fatally Defective Because of Vagueness

Since there is nothing in this indictment to indicate to or inform the Petitioners what specific interstate commerce acts were committed, it is fatally defective for vagueness. *United States v. Russell,* 82 S.Ct. 1038 (1962). In *Russell,* the Court stated that an indictment not framed to inform the defendant with reasonable certainty of the nature of the accusation against him is defective, although it may follow the language of the statute.

The Court further stated that, although the language of the statute may be used in an indictment in a general description of the offense, it must be accompanied with

such a statement of facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.

At page 1047, the Court stated:

> ". . . In an indictment upon a statute it is not sufficient to set forth the offense in the language of the statute, unless those words fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.
>
> . . . that these basic principles of fundamental fairness retain their full vitality under the modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure is illustrated by many recent federal decisions." (Cases cited.)

Of necessity, to protect the defendant's constitutional rights under the Fifth and Sixth Amendments, it is necessary that (1) defendant be given sufficient factual data as to the charges to enable him to prepare his defense, and (2) that the facts supporting the charges be sufficiently detailed to preclude any further indictment for the same charges.

Fundamentally, it is submitted, this indictment is so vague as to not meet these tests, and the verdicts must be set aside.

It is respectfully submitted that the indictment in this case is fatally defective.

II. THE VERDICTS OF GUILTY ARE NOT SUPPORTED BY THE LAW AND THE EVIDENCE

The petitioners submit that the proof offered by the Government was insufficient to prove the charges beyond a reasonable doubt and the Court erred in refusing to direct a verdict of acquittal at the close of the evidence.

The Government's burden was to prove (a) that the named defendants were public officials during the time of the alleged charges; (b) that there was a conspiracy to extort, and, in the case of defendants, Barna, extortion, and (c) that there was an effect on interstate commerce. *Stirone v. U.S.*, cited supra.

---

1. There Is Insufficient Evidence To Prove That the Petitioners Were Public Officials

---

The indictments charge that the petitioners were members of the Carbondale Area School Board; specifically as to petitioners, Barna and Ewonishon, that they were members at all times mentioned in the indictment; as to petitioners, Rupp and Cerra, that they were members from before January 7, 1970, and continuously thereafter until November 30, 1975; and as to petitioner, Mancuso, that he was a member from before January 7, 1970 and continuously thereafter until November 30, 1971.

Of course, under the Hobbs Act it was incumbent upon the Government to prove that the petitioners were in fact members of the Board during the subject periods.

Petitioners submit that the Government failed to prove that any of them were duly elected, qualified, acting members of the Board during the period of time alleged in the indictment.

There is no official record in this case to show that the petitioners were members of the Board during the indictment period. The Government failed to obtain any official record in accordance with the provisions of the Pennsylvania School Code, 24 P.S. 3-320, and Rule 27 of the Federal Rules of Criminal Procedure and Rule 44 of the Federal Rules of Civil Procedure.

In *Kingsbury v. Ledyard,* 2 Watts & S. 37 (1841), the Supreme Court of Pennsylvania held that "every public officer is required to take the prescribed oath of office as a prerequisite to the lawful discharge of his duties and in the absence of taking such oath the officer's acts are void."

A certificate of election is prima facie written title to office. 13 *P.L.E.* 94. See also Pennsylvania Constitution, Article 7, Section 1.

Neither can the Government rely on the official Minute Book of the School District, which was offered in evidence by the Government, but upon objection by petitioners, was not admitted into evidence.

Petitioners submit that there is no competent evidence to prove one of the essential elements of the charge, to wit, that they were public officials.

As to the conspiracy charge, the only overt acts on which the Government relies are the alleged payments to petitioner Barna in 1972 by Riggi, but since there is no

evidence at all that Barna was, in fact, a school director in 1972, this evidence should not have been submitted to prove the conspiracy and the conviction on Count I must fall.

As to petitioner Barna, who was convicted of substantive violations of the Act on Counts IV and V, before he could be convicted of these charges, it was incumbent upon the Government to prove that he was, in fact, a school director in 1972, and there is no evidence whatever of this fact, and the convictions on these counts must likewise fall.

---

2. There Is Insufficient Evidence To Prove That There Was Any Effect on Interstate Commerce

---

In this case, as in all Hobbs Act cases, it is incumbent upon the Government to prove that there was an effect on interstate commerce. This is a jurisdictional requirement. Petitioners submit that the proof offered by the Government, over the objection of defense counsel, was totally insufficient to meet the requirements of the Act.

The only testimony offered in this area by the Government was that of Mr. Riggi, the architect. Riggi testified flatly that he had no interstate business with out-of-state firms (Trial Transcript p. 155). He did state that on an occasion he did obtain architectural renderings from two firms in either Ohio or California (Trial Transcript pp. 105-108), but he did not state that he hired them or paid them any sums of money whatever. This,

of course, was entirely new testimony—it was not given to the Grand Jury (Appendix, infra, p. 42). There is no evidence of how often, or if ever, he did business with these firms, what he paid them, or if he paid them at all. He stated that a rendering was made for the Carbondale Area High School, but he did not state that it was made by any out-of-state firm. There is no evidence as to who made it (Trial Transcript pp. 106-107). It is submitted that this testimony was insufficient to bring this case within the ambit of interstate commerce.

The Government counsel attempted to supply what to him was an apparent lack of interstate commerce proof by attempting to include the construction contractor's work and materials, but the architect had nothing to do with these materials, and he is the alleged victim, not the contractor. The architect's duty was to supervise the building of the school, not build the school. He had nothing to do with the acquisition of the materials by the contractor. His only interest was to be sure that the materials were within the parameters of quality and quantity as required by the contract. Where the materials came from was of no import to the architect and it cannot be said that the acquisition of these materials was part of his business (Trial Transcript p. 132).

Petitioners submit that the proof of interstate commerce activity offered by the Government is totally insufficient to meet its burden of proof and these appeals must be sustained.

III. THERE WAS A FATAL VARIANCE BETWEEN THE ALLEGATIONS IN THE INDICTMENT AND THE PROOF OFFERED BY THE GOVERNMENT

Petitioners submit that there were no allegations of interstate commerce activity which obstructed, delayed or affected commerce, and the Government's attempt to prove same by testimony of its witness Riggi was inadmissible and the Court erred in allowing such evidence. *U.S. v. Callanan,* cited supra; *Stirone v. U.S.,* cited supra; and *U.S. v. Critchley,* cited supra.

CONCLUSION

The requested Writ of Certiorari should issue.

Respectfully submitted,
Bernard J. Brown,
Attorney for Petitioners

407 First National Bank Bldg.
Carbondale, Pa. 18407

APPENDIX

A. JUDGMENT ORDER

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 78-1226, 78-1227, 78-1228, 78-1229 and 78-1230

UNITED STATES OF AMERICA

v.

JOHN BARNA, ANDREW EWONISHON, FRANK E. RUPP, JR., JOSEPH F. CERRA and FRANK T. MANCUSO,

Appellants

(Criminal Nos. 76-126-1, 76-126-2, 76-126-4, 76-126-5 and 76-126-6)
M.D. Pa.

Submitted Under Third Circuit Rule 12 (6)
June 22, 1978

Before Seitz, *Chief Judge,* Aldisert and Rosenn, *Circuit, Judges.*

JUDGMENT ORDER

After considering the contentions raised by the appellants, to-wit, that (1) the indictment is insufficient

to constitute an offense against the United States; (2) the verdicts of guilty are not supported by the law and the evidence; and (3) there was a fatal variance between the allegations in the indictment and the proof offered by the government; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,
Collins J. Seitz
Chief Judge

Attest:
Thomas F. Quinn
Thomas F. Quinn
Clerk

Dated: Jun 23 1978

(B) MEMORANDUM

IN THE UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 76-126 (1-6)

United States Of America

vs.

John Barna, Andrew Ewonishon, James J. Moore, Frank E. Rupp, Jr., Joseph F. Cerra, and Frank T. Mancuso, Defendants

---

MEMORANDUM

The six named Defendants were charged in the first count of a six-count indictment with conspiracy to extort in violation of the Hobbs Act, 18 U.S.C. §1951. Defendant Moore was charged, in Counts II and III, and Defendant Barna was charged, in Counts IV, V and VI, with substantive violations of the Hobbs Act. Counts II, III and VI were dismissed by the Court. At trial the jury found all Defendants guilty of Count I and Defendant Barna guilty of Counts IV and V. All Defendants have moved for a new trial or, in the alternative, for arrest of judgment.

INTERSTATE COMMERCE

The substance of the offense charged is that Defendants wrongfully used their position as members of the Carbondale Area School Board to secure payment to themselves of "kickbacks" from the firm of Riggi & Riggi, in return for the award of a contract for architectural services in connection with the construction of a new school building. The most substantial of the grounds advanced in support of Defendants' motion is that the effect of this transaction on interstate commerce[1] has been neither proven nor adequately pleaded.

It is well-settled law that, to convict under the Hobbs Act, the government need not prove that any specific commodity moving in commerce was obstructed or that commerce was obstructed in any specific manner.

[1] To the extent relevant to this action the Hobbs Act provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

It is sufficient to show that the Defendants' acts, taken as a whole, could reasonably be regarded as affecting commerce in any degree, however slight. *United States v. Mazzei,* 521 F.2d 639 (3d Cir. 1975); *United States v. Staszcuk,* 517 F.2d 53 (7th Cir. 1975); *United States v. Amato,* 495 F.2d 545 (5th Cir. 1972). The transcript of proceedings (hereafter TR) in this case contains the following testimony linking this architectural contract to interstate commerce:

(1) Riggi & Riggi contracts with firms in California and Ohio for architectural renderings. TR 105-106. (There was no testimony as to whether any renderings were made in connection with this project.)

(2) Bids on the project were solicited from contractors located outside of Pennsylvania. TR. 110.

(3) Materials acquired from out of state were incorporated in the new school building, the construction of which was supervised by Riggi & Riggi. TR 132.

(4) Payments to Riggi & Riggi for work done on the project were often held up by Defendants pending negotiation of the amount to be "kicked back" from each payment. TR. 124.

The above evidence of interstate activity is scant, but it is sufficient to permit the jury to infer that Defendants' demand for "kickbacks" delayed the construction project, and its concomitant interstate flow of goods, in some degree, however insubstantial. This is sufficient to support a conviction.

Defendants also contend that the effect of their acts on interstate commerce is not adequately pleaded in the indictment. Count I of the indictment essentially incorporates the language of the Hobbs Act, charging that Defendants:

> ". . . did conspire to knowingly, wilfully and unlawfully obstruct, delay and affect commerce [and] the movement of articles and commodities in commerce as that term is defined in Section 1951 (b) (3), Title 18 U.S.C. by extortion as defined in Section 1951 (b) (2), Title 18 U.S.C. in that the defendants aforesaid and the unindicted co-conspirators aforesaid, in their positions as members of the Carbondale Area School Board, Carbondale, Pennsylvania, did conspire to obtain property that was not due to them by wrongful use of fear and under color of official right.
>
> The substance of the conspiracy is as follows:
>
> . . . ."

The indictment then goes on to enumerate five overt acts, none of which contain any specific allegation of interference with commerce.

Counts IV and V, the only substantive counts that went to the jury, similarly charge that Defendant Barna

"did knowingly wilfully and unlawfully obstruct, delay and affect commerce . . ." by obtaining money from Riggi & Riggi.

Clearly, if no specific instance of obstruction of commerce need be proven to obtain a conviction, then none need be pleaded to support a valid indictment. *United States v. Stirone,* 361 U.S. 212, 4 L. Ed. 2d 252 (1960), relied on heavily by Defendants, does not require that the commerce element of a Hobbs Act violation be specifically pleaded. *Stirone* establishes only that, where a specific theory of effect on commerce is alleged in the indictment the government may not then proceed to prove a different theory at trial:

> "It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened."
>
> 361 U.S. at 218, 4 L. Ed. 2d at 257-258.

Numerous other cases have held that an indictment containing only a general allegation of effect on commerce is sufficient. *Anderson v. United States,* 262 F.2d 764 (8th Cir. 1959); *United States v. Frumento,* 405 F. Supp. 23 (E.D. Pa. 1975); *United States v. Quinn,* 364 F. Supp. 432 (N.D. Ga. 1973); *United States v. Malinsky,* 19 F.R.D. 426 (S.D. N.Y. 1956).

Although this indictment is so general as to be at the extreme lower limit of sufficiency, we nonetheless

conclude that it is adequate. The extortionate scheme, which is the core of criminality addressed by the Hobbs Act, is set forth in detail. This is sufficient to apprise Defendants of the charge against them and protect them against double jeopardy. See *United States v. Addonizio,* 451 F.2d 49 (3d Cir. 1972). The required minimal effect on commerce, which is jurisdictional only, and not part of the criminal act with which Defendants are charged,[2] can be inferred from the allegation of an extortionate scheme involving a major construction project.

Since we conclude that the indictment is valid on its face we will not discuss Defendants' speculations as to what evidence may or may not have been presented to the grand jury. See *United States v. Callandra,* 414 U.S. 338 (1974); *United States ex rel. Almeida v. Rundle,* 383 F.2d 421 (3d Cir. 1967).

DEFENDANTS' STATUS AS PUBLIC OFFICIALS

Defendants contend that the Government has failed to prove extortion under the color of official right,[3] in that there has been no proof that Defendants were in fact members of the Carbondale Area School Board dur-

[2] It is not necessary to charge or prove that Defendants knew or intended that their acts would affect commerce in any way. United States v. Starks, 515 F.2d 112 (3d Cir. 1975).

[3] The Government concedes that there has been no proof of the use of force, violence or fear, and thus extortion must be established, if at all, through proof of wrongful use of public office.

ing the period covered by the indictment.[4] Assuming *arguendo* that the government has failed to prove actual membership, there is ample evidence of action *under color of* official right to support the convictions. The testimony of Mr. Riggi, TR 108-310, establishes that payments were made for the purpose of securing a contract which, at least in Riggi's understanding, Defendants had the power to award. This exploitation of Riggi's beliefs as to Defendants' official powers is sufficient to make out a violation of the Act regardless of whether they in fact had such powers. *United States v. Mazzei,* 521 F. 2d 639 (3d Cir. 1975).

EXTORTION

Defendants argue that there has been no proof that any of the payments made to Defendants were in fact extortionate. This argument is wholly without merit. As discussed above, the testimony of Mr. Riggi supports a finding that payments were demanded in return for the award of a contract over which Defendants had control by virtue of their positions as school directors. This establishes extortion as defined by the Hobbs Act regard-

[4] Although Defendants contend that there has been inadequate proof of their membership on the board, they offered nothing at trial to rebut testimony that they attended Board meetings and participated in the award of the contract to Riggi & Riggi. TR 8-16, 206-211. Nor have Defendants disputed the authenticity of checks, drawn on the School Board's account, on which the signatures of Barna, Rupp, Cerra and Mancuso appear, Government Exhibits 2a-2s.

less of whether the payments are characterized as "political contributions" or "kickbacks". *United States v. Trotta,* 525 F.2d 1096 (2d Cir. 1975); *United States v. Starks,* 515 F.2d 112, 124 (3d Cir. 1975).

STATUTE OF LIMITATIONS

Defendants contend that the verdict on Count I must be set aside because the government has failed to prove any overt act in furtherance of the conspiracy within five years of the indictment. This contention is simply unsupportable. Mr. Riggi testified, at TR 125, 128-130, that he made payments to Defendant Barna in March and July of 1972, well within the five-year limitation period.[5] We also reject Defendants' suggestion that there was inadequate evidence to establish an agreement to extort and to link the payments to Barna in 1972 with such an agreement. See TR 12-35.

VARIANCE

Counts IV and V of the indictment charge that payments were made to Barna "on or about" April 15 and July 15, 1972, respectively. At trial Mr. Riggi could not recall the exact dates upon which the payments were made, but testified that he received checks in payment for work performed on the contract on March 2, 1972 and July 10, 1972, and "kicked back" money to Barna

[5] The indictment was returned on September 17, 1976.

shortly after receipt of each check. TR 125-128. Defendants contend that this is a fatal variance between the charge in the indictment and the proof adduced at trial. We disagree. This is not a substantial variance and Defendants can point to no prejudice arising from the government's failure to prove that payments were made on precisely the dates stated in the indictment. Thus the proof is adequate to support conviction. See *United States v. Somers,* 496 F.2d 723, 745 (3d Cir. 1974).

For the above reasons Defendants' motions will be denied.

(s) R. Dixon Herman
R. Dixon Herman
United States District Judge

Dated: January 10, 1978

C. INDICTMENT

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No.
Vio: 18 U.S.C. 1951

United States of America,

Plaintiff

vs.

John Barna,
Andrew Ewonishon,
James J. Moore,
Frank E. Rupp, Jr.,
Joseph F. Cerra,
Frank T. Mancuso,
Francis P. Monahan,

Defendants

INDICTMENT

THE GRAND JURY CHARGES:

1. a) At all times mentioned in this Indictment, defendant JOHN BARNA was a member of the Carbondale Area School Board, Carbondale, Pennsylvania.

b) At all times mentioned in this Indictment, defendant ANDREW EWONISHON was a member of the Carbondale Area School Board, Carbondale, Pennsylvania.

c) At all times mentioned in this Indictment, defendant JAMES J. MOORE was a member of the Carbondale Area School Board, Carbondale, Pennsylvania.

d) From before January 7, 1970 and continuously thereafter until November 30, 1975, defendant FRANK E. RUPP, JR. was a member of the Carbondale Area School Board, Carbondale, Pennsylvania.

e) From before January 7, 1970 and continuously thereafter until November 30, 1975, defendant JOSEPH F. CERRA was a member of the Carbondale Area School Board, Carbondale, Pennsylvania.

f) From before January 7, 1970 and continuously thereafter until November 30, 1971, defendant FRANK T. MANCUSO was a member of the Carbondale Area School Board Carbondale, Pennsylvania.

g) From December 1, 1971 and continuously thereafter FRANCIS P. MONAHAN was a member of the Carbondale Area School Board, Carbondale, Pennsylvania.

h) At all times pertinent to this Indictment, the Carbondale Area School Board members occupied a position where, through the exercise of their judgment and as part of their official duties, contracts were awarded and bills were approved for payment to persons doing business with the Carbondale Area School District.

2. At all times mentioned in this Indictment, Eugene J. Peters and Vincent S. Riggi were partners in the

architectural firm of Riggi and Riggi, Dunmore, Pennsylvania.

THE GRAND JURY FURTHER CHARGES:

COUNT I

That from on or about the 7th day of January, 1970 and continuing thereafter until the date of this Indictment, at Carbondale, Lackawanna County, Commonwealth of Pennsylvania, and elsewhere within the Middle District of Pennsylvania and within the jurisdiction of this Court,

JOHN BARNA
ANDREW EWONISHON
JAMES J. MOORE
FRANK E. RUPP, JR.
JOSEPH F. CERRA
FRANK T. MANCUSO
FRANCIS P. MONAHAN

did knowingly, wilfully and unlawfully combine, conspire, confederate and agree with each other and with Eugene T. Coolican and Joseph P. McDonald unindicted co-conspirators, and with other persons to the Grand Jury unknown, to commit certain offenses against the United States in violation of the provisions of Section 1951 of Title 18 U.S.C., in that they did conspire to knowingly, wilfully and unlawfully obstruct, delay and affect commerce in the movement of articles or commodities in commerce as that term is defined in Section 1951 (b) (3), Title 18 U.S.C. by extortion as defined in Section 1951 (b) (2), Title 18 U.S.C. in that the defendants aforesaid and the unindicted co-conspirators aforesaid, in their positions as members of the Carbondale Area

School Board, Carbondale, Pennsylvania, did conspire to obtain property that was not due to them by wrongful use of fear and under color of official right.

The substance of the conspiracy was as follows:

The defendants and co-conspirators were members of the Carbondale Area School Board during the period of the conspiracy.

As members of the Carbondale Area School Board, they had the authority to award contracts for the purchase of property, supplies and services to be used by the School District.

The defendants and co-conspirators used their authority, as aforesaid, to wrongfully obtain money from the architectural firm of Riggi and Riggi who wished to provide services to the Carbondale Area School District.

OVERT ACTS

In furtherance of the conspiracy and, in order to accomplish the ends thereof, the defendants and unindicted co-conspirators committed the following overt acts.

1. On or about May 1, 1970, the defendants, John Barna, Andrew Ewonishon, James J. Moore, Frank E. Rupp, Jr., Joseph F. Cerra, Frank T. Mancuso, and the co-conspirators, Eugene T. Coolican and Joseph P. McDonald, held a meeting at Carbondale, Pennsylvania at which time it was agreed by all defendants that the firm of Riggi and Riggi would provide the most money for the

architectural contract and that the contract would be awarded to them.

2. On or about May 27, 1970, a motion was made by John Barna at the meeting of the Carbondale Area School Board that the architectural contract for the proposed Junior-Senior High School be awarded to the firm of Riggi and Riggi.

3. On or about June 15, 1970, the firm of Riggi and Riggi signed a contract with the Carbondale Area School Board to build the new Junior-Senior High School.

4. On or about June 30, 1970, James J. Moore, the defendant, received from Riggi and Riggi approximately $10,000.00 as the first payment to be made to the Board pursuant to the conspiracy.

5. On or about November 1, 1972, Francis P. Monahan, a new member of the Carbondale Area School Board, demanded that he receive a share of the monies received from Riggi and Riggi and the other members agreed.

The Grand Jury incorporates herein as overt acts all those acts as set forth in this Indictment and charged as Counts 2 through 6.

In violation of Title 18, U.S.C. Section 1951.

THE GRAND JURY FURTHER CHARGES:

COUNT II

On or about the 1st day of June, 1971, at Lackawanna County, Commonwealth of Pennsylvania and elsewhere within the Middle District of Pennsylvania,

JAMES J. MOORE

did knowingly, wilfully and unlawfully obstruct, delay and affect commerce and movement of articles or commodities in commerce, as that term is defined in Section 1951 (b) (3), Title 18, U.S.C., by extortion as defined in Section 1951 (b) (2), Title 18 U.S.C., in that the defendant, in his position as Director of the Carbondale Area School Board, did obtain property that was not due him in the form of money from the architectural firm of Riggi and Riggi, with their consent, induced by wrongful use of fear and under color of official right.

In violation of Title 18, U.S.C. Section 1951.

THE GRAND JURY FURTHER CHARGES:

COUNT III

On or about the 15th day of June, 1971, at Lackawanna County, Commonwealth of Pennsylvania and elsewhere within the Middle District of Pennsylvania,

JAMES J. MOORE

did knowingly, wilfully and unlawfully obstruct, delay and affect commerce and movement of articles or commodities in commerce, as that term is defined in Section 1951 (b) (3), Title 18 U.S.C., by extortion as defined in Section 1951 (b) (2), Title 18 U.S.C., in that the defendant, in his position as Director of the Carbondale Area School Board, did obtain property that was not due him in the form of money from the architectural firm of Riggi and Riggi, with their consent, induced by wrongful use of fear and under color of official right.

In violation of Title 18, U.S.C. Section 1951.

THE GRAND JURY FURTHER CHARGES:

COUNT IV

On or about the 15th day of April, 1972, at Lackawanna County, Commonwealth of Pennsylvania and elsewhere within the Middle District of Pennsylvania,

JOHN BARNA

did knowingly, wilfully and unlawfully obstruct, delay and affect commerce and movement of articles or commodities in commerce, as that term is defined in Section 1951 (b) (3), Title 18 U.S.C., by extortion as defined in Section 1951 (b) (2), Title 18 U.S.C., in that the defendant, in his position as Director of the Carbondale Area School Board, did obtain property that was not due him in the form of money from the architectural firm of Riggi and Riggi, with their consent, induced by wrongful use of fear and under color of official right.

In violation of Title 18, U.S.C. Section 1951.

THE GRAND JURY FURTHER CHARGES:

COUNT V

On or about the 15th day of July, 1972, at Lackawanna County, Commonwealth of Pennsylvania and elsewhere within the Middle District of Pennsylvania,

JOHN BARNA

did knowingly, wilfully and unlawfully obstruct, delay and affect commerce and movement of articles or commodities in commerce, as that term is defined in Section 1951 (b) (3), Title 18, U.S.C. by extortion as defined in Section 1951 (b) (2), Title 18, U.S.C., in that the defendant, in his position as Director of the Carbondale Area School Board, did obtain property that was not due him in the form of money from the architectural firm of Riggi and Riggi, with their consent, induced by wrongful use of fear and under color of official right.

In violation of Title 18, U.S.C. Section 1951.

THE GRAND JURY FURTHER CHARGES:

COUNT VI

On or about the 20th day of February, 1973, at Lackawanna County, Commonwealth of Pennsylvania and elsewhere within the Middle District of Pennsylvania,

JOHN BARNA

did knowingly, wilfully and unlawfully obstruct, delay and affect commerce and movement of articles or commodities in commerce, as that term is defined in Section 1951 (b) (3), Title 18, U.S.C., by extortion as defined in Section 1951 (b) (2), Title 18, U.S.C., in that the defendant, in his position as Director of the Carbondale Area School Board, did obtain property that was not due him in the form of money from the architectural firm of Riggi and Riggi, with their consent, induced by wrongful use of fear and under color of official right.

In violation of Title 18, U.S.C. Section 1951.

A TRUE BILL

(s) A. W. Harding

Foreman

Dated: Sept 17, 1976

/s/ S John Cottone

United States Attorney

D. EXCERPTS FROM GRAND JURY TESTIMONY

VINCENT S. RIGGI, duly sworn, testified as follows:

Examination By Mr. Cognetti:

Q. Mr. Riggi, before we begin, the first question is, have you been duly sworn?

A. Yes.

Q. Before we begin, I would like to advise you that this Grand Jury is investigating political corruption in the Carbondale School District. You were not the subject of this investigation, but during the investigation it is advisable that we give you your rights because of the investigation. You have a right to consult an attorney before you appear here or if at any time during your appearance, feel you would like to discuss something with your attorney, you may. Do you understand that, sir?

A. On the advice of my attorney I refuse to answer on the grounds any answer may tend to incriminate me.

Q. You are represented by an attorney?

A. Yes, sir.

Q. And your attorney is outside the Grand Jury room?

A. Yes, sir.

Q. Mr. Carlon O'Malley, Jr.

A. Yes.

Q. And he represents Mr. Peters also?

A. On the advice of my attorney I invoke my rights under the Fifth Amendment.

Q. Is it your intention to take the Fifth Amendment to any and all questions I put forward to you?

A. Yes, sir.

Q. You have no intention of speaking on any matters pertaining to the awarding of the contract with the Carbondale School District?

A. Right.

Q. You are going to take the Fifth Amendment to all questions?

A. That's right.

Q. Are you taking the Fifth Amendment to questions dealing with your relationship with Mr. Gene Peters?

A. Yes, sir.

Q. And his knowledge of your dealings with the Carbondale School District?

A. Yes.

Q. I have no further questions of you. You may be excused.

* * * * * * *

VINCENT S. RIGGI, duly sworn, testified as follows:

Examination By Mr. Cognetti:

Q. Mr. Riggi, your address?

A. 420 North Layton Street, Dunmore.

Q. And you are a partner in the firm of Riggi & Riggi?

A. Yes.

Q. Were you approached to give money to the Carbondale Area School District by the Directors?

A. Yes, sir.

Q. Did you?

A. Yes, sir.

Q. On or about June 30, 1970, did you give approximately $10,000 to James J. Moore?

A. Yes, sir.

Q. On or about June 1, 1971, did you give Mr. Moore money?

A. Yes, sir.

Q. On or about June 15, 1971, did you give Mr. Moore money?

A. Yes, sir.

Q. On or about April 15, 1972, did you give John Barna money?

A. Yes, sir.

Q. On or about July 15, 1972 did you give John Barna money?

A. Yes, sir.

Q. On or about February 20, 1973 did you give Mr. Barna money?

A. Possibly, I am not entirely sure. Very possibly I did.

Q. Did any of your employees know of these payoffs?

A. No.

Q. Did your partner, Gene Peters, know of these payments?

A. I am not sure.

Q. Did your partner, Gene Peters, ever make a payment?

A. To the best of my knowledge, no.

Q. I have no further questions. You are excused.

* * * * * * *